**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|---|
| **DOUGLAS E. HOEFER** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 205,945 |
| **MANICURED LAWNS** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **WAUSAU INSURANCE COMPANIES** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant initiated this review of the Award dated July 7, 1997, entered by Administrative Law Judge Robert H. Foerschler. On November 18, 1997, the Appeals Board heard oral argument.

## APPEARANCES

James M. Sheeley of Kansas City, Kansas, appeared for the claimant. David J. Bogdan of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

## RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

## ISSUES

At oral argument before the Appeals Board, the parties agreed that the only issue to be reviewed by the Board was the nature and extent of claimant's injury and disability. Judge Foerschler found that claimant had a 66⅔ percent permanent partial general disability. In his supplemental submission letter to the Judge dated May 27, 1997, claimant argued he had a 95.5 percent work disability. The respondent and its insurance carrier, on the other hand, contend claimant's permanent partial disability benefits should be limited

to the functional impairment rating as he failed to make a good faith effort to obtain appropriate employment following the May 23, 1995 accident.

## FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

(1) On May 23, 1995, the claimant, Douglas E. Hoefer, fell and injured his lower back, right hip, and foot. The parties stipulated that the accident arose out of and in the course of Mr. Hoefer's employment with the respondent, Manicured Lawns.

(2) From the end of May 1995 and into mid-November 1995, Mr. Hoefer treated with his personal chiropractor, Micheal V. Merritt, D.C. From mid-September 1995 through the first part of March 1996, he treated with board-certified orthopedic surgeon David A. Tillema, M.D.

(3) Because of the accident, Mr. Hoefer now has chronic back pain and a 9 percent whole body functional impairment rating. The 9 percent functional impairment rating is an average of the 5 percent rating provided by Dr. Tillema and the 13 percent rating provided by P. Brent Koprivica, M.D., who saw and evaluated claimant in April 1996.

(4) Dr. Tillema released Mr. Hoefer to return to work in March 1996. Since that date Mr. Hoefer has not made a good faith effort to find appropriate employment. At the time of the regular hearing in February 1997, Mr. Hoefer was unemployed and lived by bartering his labor for food and work. Although he testified he had looked for work, Mr. Hoefer has not submitted any job applications. Mr. Hoefer's attempts to find work have been half-hearted and ineffective. Mr. Hoefer rejected the job placement services the insurance carrier offered.

(5) Judge Foerschler found that Mr. Hoefer's average weekly wage at the time of the May 1995 accident was $320. Because neither party has appealed that finding, the Appeals Board adopts it as its own.

(6) Despite the work-related injury, Mr. Hoefer retains the ability to earn $8 per hour. That conclusion is based upon the information provided and compiled by vocational consultant Robert Miller, who was hired by the insurance carrier to provide Mr. Hoefer with job placement assistance. Mr. Miller identified numerous jobs, many of which paid $7 and $8 per hour, that Mr. Hoefer could perform without violating his medical restriction of no frequent lifting over 50 pounds.

(7) The Appeals Board adopts the findings set forth by Judge Foerschler to the extent they are not inconsistent with the above.

## CONCLUSIONS OF LAW

(1) Because his is an "unscheduled" injury, Mr. Hoefer's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e. That statute provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The above statute, however, must be read in light of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091(1995), and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wage would be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

(2) As indicated above, Mr. Hoefer did not put forth a good faith effort to find appropriate employment following his release to return to work. Therefore, the Appeals Board must impute a post-injury average weekly wage. Because Mr. Hoefer retains the ability to earn $8 per hour or $320 per week, he retains the ability to earn as much as he was earning on the date of accident.

(3) Because this Board imputes a post-injury average weekly wage that is at least 90 percent of the average weekly wage on the date of accident, K.S.A. 44-510e requires that Mr. Hoefer's permanent partial general disability benefits be limited to his 9 percent whole body functional impairment rating.

(4) The Appeals Board adopts the conclusions of law set forth by Judge Foerschler to the extent they are not inconsistent with the above.

## AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated July 7, 1997, entered by Administrative Law Judge Robert H. Foerschler should be, and hereby is, modified to award claimant a 9 percent permanent partial general disability. The remaining orders as set forth by Judge Foerschler in the Award are adopted by the Appeals Board to the extent they are not inconsistent with the above.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Douglas E. Hoefer, and against the respondent, Manicured Lawns, and its insurance carrier, Wausau Insurance Companies, for an accidental injury which occurred May 23, 1995, and based upon an average weekly wage of $320, for 30.57 weeks of temporary total disability compensation at the rate of $213.34 per week or $6,521.80, followed by 5.5 weeks of temporary partial disability benefits at the rate of $213.34 per week or $1,173.37, followed by 35.45 weeks at the rate of $213.34 per week or $7,562.90 for a 9 percent permanent partial general body impairment of function, making a total award of $15,258.07, which is due and owing less any amounts previously paid.

**IT IS SO ORDERED.**

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James M. Sheeley, Kansas City, KS
David J. Bogdan, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director